Focus and Background

The Focus of This Essay

The modernization of economic life in a globalized world is far more difficult, and yet in a way more simple, than is often believed. It requires above all a will to change and then the choice and implementation of constructive reforms that benefit the vast majority in a country, not just the elite. The twentieth century has shown clearly that "revolution" in the Leninist sense, the violent overthrow of a government by a small vanguard and its replacement by something presumably different, does not benefit most people. In fact, it has always resulted in the creation of what Milovan Djilas called a "new class," a new elite. As Lenin himself knew well, "revolutions" can easily become "restorations" of traditional authoritarian or despotic systems, which is what happened in Russia, China, and several other countries that for a long time took the communist route. And yet the reforms we discuss here are in many respects truly revolutionary, since they propose the adoption of very different ways of thinking and of often new institutions that convert without violence, or with less violence than in the country's past, different ideas and objectives into reality. Justifying the most revolutionary economic changes China has ever seen, Deng Xiaoping said: "To get rich is glorious." The enormous changes that thinking has brought to China are readily apparent. Yet, while political authoritarianism has involved a degree of repression, although the traditional and communist statist orientation of the courts has continued, and although *guanxi* (connections) often is still the best way to get things done, the law is increasingly a tool of the powerless (Diamant, Lubman and O'Brien 2005).

The changes we discuss here require increasingly complicated interactions among individuals and organizations, nationally and internationally. The mix of deregulation, the liberalization of international trade, and the privatization of state enterprises has intensified

the need for legal frameworks with clear rules for economic interaction (Buscaglia 1997). For example, the increasing permeability of national frontiers to international trade and ideas is of such magnitude that it has forced national authorities to consider the adoption of international best practices for protecting intellectual property rights (Buscaglia 1997; Buscaglia and Ratliff 2000). This essay focuses on identifying public policies aimed at counteracting organized crime's links to public sector corruption. We describe national judicial, law enforcement, and social control practices and institutions with a record of success and with the potential for at least partial application in other countries around the world.

Within criminal jurisdictions, the dark side of globalization—the combining of increasing cross-border porosity and the use of advanced technologies by criminal enterprises—has generated a bonanza for organized crime and public sector corruption (Buscaglia 2001). Thus organized crime causes high costs for delineating and protecting property and contractual rights in many developed and developing countries' jurisdictions. These pernicious effects are sometimes compounded by an inconsistent application of organized crime laws and other laws, by judicial ineffectiveness, and worst of all, by corrupt practices within the state, when failure cannot be traced to outright sabotage. As a result, societal transaction costs (reflecting the costs of acquiring information, negotiating complex transactions, and monitoring the compliance with agreements in society) have increased to levels that make it unprofitable for those demanding and supplying goods and services within a market to invest there. The international business community's judgment on this matter is reflected in the World Economic Forum's 2004 *Global Competitiveness Report,* in which the United States, northern Europe, and reforming Asian countries almost always rate high while, with few exceptions, Latin American and African countries rate low (World Economic Forum 2004).

Abundant empirical research has shown significant links between

a stronger rule of law and greater economic growth (Buscaglia 1993; Mauro 1995; de Soto 2000; Buscaglia and Dakolias 1999), at least in much of the world. Accordingly, many developed and developing countries have attempted to reform their laws and judiciaries in the process of their political and social efforts to strengthen democracy, to enhance the protections of human rights, and to foster private investment. Others, particularly in Asia, have begun successful economic reform with "informal" *guanxi* (connections), rather than with formal legal structures, which is just one of several reasons such an overwhelming percentage of foreign investments in China have come from overseas Chinese. Over time these developing countries have sought to establish legal systems that are in varying degrees related to those in Western developed nations. In a globalized world, movement in this direction, particularly in international relations, seems inevitable. Still, an international comparative analysis demonstrates that legal and judicial reform has shown mixed results around the world (Buscaglia and Dakolias 1999). Dysfunctional laws and limited judicial capacities in the police, prosecutorial, and judicial domains are the common denominators in failed legal and judicial reform worldwide and thus usually impede good public sector governance and economic growth (Buscaglia 2001). A short account of the factors explaining these mixed results will be covered below.

Strengthening the rule of law, with the aim of securing property and civil rights for all citizens and of reducing corruption, improving contractual enforcement, and generating economic prosperity, is a complicated process in several ways. It requires making the state's exercise of power more coherent, more predictable, and more consistent with the incentives needed to foster investment and promote economic growth. In its ideal form, a rule-of-law state is one in which all individuals and groups, indeed the government itself, are subject to the same laws, thus guaranteeing that every person, regardless of socioeconomic condition, ethnicity, or gender, will enjoy equal rights

under a judicial system that is feasibly accessible to all (Buscaglia 1995).

Economic progress in much of the world, as well as "simple justice," requires legal rules that are clearly defined and known to the public, but also rules that are interpreted and enforced by a judicial system immune to systemic abuses of politics and substantive and procedural discretions. There is an increasing need for legal rules to be designed, interpreted, and enforced consistently in nation states and across international borders to enhance risk management and foster wealth generation in an increasingly complex world (Buscaglia 1993). Our analysis draws from the discipline known as the law and economics of development and growth. This discipline aims at identifying changes in laws and improvements in interpretation and enforcement mechanisms that, within the social and legal traditions of each country and the world, are able to enhance sustainable economic development and security.

Sources of Lawmaking and Economic Growth

One recently emergent line of research in the law and economics of development literature concentrates on the socioeconomic foundations of the sources of those rules that will allow the law and its enforcement mechanisms to adapt to a modern economy and, by adapting to it, foster economic growth. This topic is explored in a theoretical manner by Cooter (1996), who argues that efficiency is enhanced by a "bottom-up" process of capturing evolutionarily successful social norms (that is, coordinating mechanisms for social interaction) that are already in place as "informally" relevant in human interaction. This decentralized approach to lawmaking stands in sharp contrast to the centralization proposed by the first law and development movement that during the 1960s and 1970s advocated clear centralization and modernization of laws through legal transplants.

The most important contribution in this first movement can be

ascribed to Seidman (1978), who sponsored comprehensive, centralized, and top-down legislative reform aimed at modernizing the public and private dimensions of the law. In this approach, administrative law, as the top-down framework establishing the rules to be followed in relations between the state and private individuals, was related to the expansion of the government's role in societies worldwide. The sources of inspiration for this movement included national traditions, the Enlightenment, Italian fascism, the rise (before the collapse) of communist and socialist systems, the active advocacy of such international institutions as the United Nations, and strong state-oriented movements among intellectuals almost everywhere, the latter including the creators of the original law and economics movement. The common law or judge-made law sustained by *stare decisis* suffered from this significant expansion of administrative law.

Today, legal systems around the world face a choice between generating laws and regulations in a centralized, top-down way or legalizing and enforcing social norms with a bottom-up approach, which often requires a degree of accommodation. That is, civil code systems can continue to try to impose rules that are irrelevant much of the time to real people, or they can try to make law relevant to the lives of people and society generally by capturing the norms of local, national, and international business and other communities. Following Hayek (1973), one can argue that the higher information constraints that are the product of added social complexity in modern societies require public policy to decentralize lawmaking by capturing norms and thus cutting market transaction costs, a reality recognized very clearly in Botswana (U.S. Department of State 2005). As Cooter (1996, 148) states, "efficiency requires the enforcement of customs in business communities to become more important relative to the regulation of business." From this perspective, the irrelevance of the civil and commercial laws enacted by legislatures in many countries must be understood as a reflection of the lack of correspondence between the essence of what the law stipulates and the social norms followed

by people and businesses in their daily lives. When regulations or laws so lack compatibility, the cost of complying and enforcing the law becomes higher, that is if the law functions at all.

These are what Hernando de Soto has called "bad laws," or legislation that actually impedes or disrupts economic efficiency in much of the world, resulting in the absence of secure property rights for all and thus in enormous levels of "dead capital" and in little national development. In his work, de Soto contrasts the approximate transaction cost of complying with this "bad law" with the transaction cost of following the social norm in an informal market. Here we see that the higher transaction cost is rooted in the drive of governments to centralize lawmaking without regard for the true social practices followed by people. Thus de Soto argues that the size of informal sectors around the globe is intimately related to the way laws and regulations fail to capture the social practices followed by society. Only when the laws and regulations begin to reflect these practices will the transaction cost of the affected social interactions decline and a movement toward efficiency occur (de Soto 1989, 1997, 2000). And as Buscaglia (1997) shows, until movement occurs, there will be a widening gap between law in action and law on the books. The choice is clear. Real change will come only when there is determination to change and a willingness to reduce or somehow accommodate the cultural and institutional obstacles that can so easily prevent real legal reform (North 1990; Ratliff 1999; Vargas Llosa 2005).

Following Cooter (1994, 1996) and Mattei (1991), we argue that generating obedience to laws requires compatibility between the substance and procedures of these laws and the ethical code prevailing in society. Individuals in social frameworks seek the kind of predictability that will increase their ability to generate wealth through their interactions. In the real world, different levels of concentration of political and economic power may be compatible in varying degrees with predictable rules of the game. But whatever the concentration of political and economic power, when social norms and values sup-

port the prevailing and predictable rules of political and economic interaction, the efficiency of allocation and equity in interpreting and applying these laws will reduce the transaction cost of social interaction and enhance prospects for development.

With this reality in mind, societal norms must be found by public institutions and transformed into formalized legal rights and obligations in each branch of the law. One could here extend Cooter's analysis and state that to enhance effectiveness in the application and execution of laws, policies must follow not just the market but also the nonmarket social norms. In a more comprehensive way, civil society's market and nonmarket rules for social and political interaction provide a foundation for lawmaking in the legislature and the judiciary. By making laws based on what is familiar to the individual, a society can lower the transaction cost of human interactions and move toward greater legal effectiveness and efficiency in its market and nonmarket activities (Buscaglia and Ratliff 2000, 9–19). The evolution of intellectual property laws worldwide is a good example of how even legal transplants may provide a channel through which national laws start to follow business practices and social norms.

Finally, it is clear that a centralized and discretionary top-down approach to lawmaking has led to a general rejection (or in the best of cases, the irrelevance) of formal legal systems in many countries. In these countries, large segments of the population often perceive themselves as divorced from the formal law generated by legislative bodies. This institutional "divorce" reflects a gap between the "formal law in the books" and the "law in action" that is characteristic of such countries, which are many. Because of this gap, large segments of the population who lack the information or resources to overcome the significant substantive and procedural barriers preventing access to court systems pursue informal means in their general interactions in society and in redressing their grievances. For example, the relation between these socioeconomic barriers and the growth of alternative dispute resolution mechanisms has been empirically demonstrated in

seventeen countries (Buscaglia and Stephan 2004). In practice, informal institutions provide an escape valve in certain kinds of conflict where states do not offer secure popular access to formal dispute resolution mechanisms. In Colombia, people may even turn to guerrillas supporting drug lords for "legal" redress (Buscaglia and Ratliff 2001). Yet many other disputes over fundamental rights and public interests go unresolved by any "legal" institution. This state of affairs undermines the legitimacy of the state, hampers economic interactions, and disproportionately burdens the poorest segments of the population (de Soto 2000).

This institutional "divorce" contrasts the promises of laws and commitments on the books with the realities of nondelivery and the resulting lack of improvement in, or even deterioration of, most people's lives. And when these failures are repeated, they teach disrespect for law itself, particularly when the population is acquainted with the more responsive common law tradition in the United States. In Latin America, for example, there have been centuries of unfulfilled promises, for as a Peruvian analyst says, "law" has almost always been "political law," serving the interest of the elite in power rather than that of the people as a whole. This has contributed to Latin America's terrible inequalities and chronic underdevelopment, or very uneven domestic development, as in Brazil, since real change has been impeded by cultural attitudes and institutional obstacles dating back to the colonial period, and earlier (Vargas Llosa 2005). As recent polls by Latinobarómetro show, only about 20 percent of Latin Americans have much or even some confidence in their justice systems; the majority correctly consider most of their judicial systems in varying degrees corrupt, inefficient, and in the pockets of the elite.

In Asia, where there is no nearby tradition of the common law's "equality before the law," it has been more complicated. Legal reforms have been passed in China, for example, but the new laws often are not fully implemented. In some cases there is no pretense of "state of law" legality (Yardley 2005; Laogai 2003–2004). At the same time,

although China is by no means a rule-of-law state, it has had the highest sustained growth rate in the world (about 9.5 percent yearly for almost twenty-five years). The editors of a recent study conclude that most elites in China think that "law is essential because it contributes to a more orderly society" (Diamant, Lubman and O'Brien 2005, 7). As in Latin America, there is often a large gap between laws on the books and laws effectively implemented. But most people in China, unlike those in Latin America, have benefited significantly from reform under Deng Xiaoping and subsequent party leaders, even though the Communist Party still controls the justice system (Mertha 2005).

Legal Transplants and Economic Efficiency

There are three main sources of a country's laws. First, government leaders can draw up a law completely from within their country's own sociojudicial tradition, implementing it through the country's own institutional mechanisms. Second, they can import rules as a package from outside their domestic political-legal tradition and try to adopt them exactly or largely as they were drawn up abroad. Or third, they can import a law from outside but adapt it to work effectively (or if the "reformers" are ignorant or wish to sabotage the effort, ineffectively) in the cultural context of their own country. Indeed, as shown in the negotiations to define "organized crime" mentioned below, adaptations of one's original position are often essential to being able to work constructively with other groups or countries that see things somewhat differently for cultural and other reasons. Some kinds of laws are more likely to be adopted with little or no change, those of an international nature, while other kinds are more likely to be substantially adapted, those dealing mainly with domestic issues. The principal factor in the beginning is deciding which of these options to choose, and this decision will depend on what the reformers want, or at least claim they want, to accomplish.

Watson (1978) demonstrated that legal transplants have a long history, whether in the wholesale transfer of civil law to Latin America in the past or in the adoption of an individual law today. One may then ask why, from an international pool of laws available for transplant, certain rules and institutions are commonly adopted, adapted, and later enacted in varied jurisdictions, whereas others are rejected. For example, why do so many countries adopt (through the ratification of international conventions) certain rules and standards to protect intellectual property, even if they do not carry them out very effectively, while they reject others? Why has China so effectively used foreign ideas in its anti-counterfeiting enforcement regime at all judicial levels (Mertha 2005)? Or more fundamentally, why do some countries adopt adversarial judicial systems and oppose inquisitorial systems, or separation of powers as opposed to parliamentary systems? In the end, to what degree do Watson's observations apply usefully to Asia? Some analysts say little or perhaps not at all (Alford 1995).

The economic analysis of the law can provide an explanation and guide to transplants by applying tests to determine if the transplanted legal rules are the most efficient and effective possible. That is, an intertemporal cost-benefit analysis may explain why some legal rules and systems are adopted or adapted and others rejected. Eggertsson (1990) warned that different legal systems might compute the cost and benefit of legal rules differently, because real economic and legal factors (such as national resource endowments or sociojuridical culture) vary across regions and nations. And legal reform is subject to political pressure from individuals or groups inside or outside the state, including the dominant international powers of the time. For example, a profound alteration in an existing legal system may threaten the private professional interests of lawyers and others or challenge the interests of public officials whose cooperation is essential for the effective application, interpretation, and enforcement of new laws (Buscaglia and Ratliff 2000).

A case study of legal transplants from best-practice countries can be provided by examining the generation of the existing international legal framework to combat organized crime. As stated in the beginning, transnational organized crime has been experiencing a bonanza owing to the mix of increasing international cross-border technological improvements and liberalization of commerce. Because transnational organized crime represents what economists call an interjurisdictional (i.e., international) negative externality or "public bad," a group of pioneer countries, including Italy and the United States, tried to develop a common international legal framework that could be transplanted to other countries to combat criminal enterprises through common operational mechanisms. Even with this decision made, problems emerged immediately. At first, even the definition of organized crime seemed to present a barrier to an international agreement. In time, law enforcement agencies in Europe developed a number of operational definitions of the term "organized criminal group." Those definitions agreed on the following crucial elements: such a group must be structured, possess some degree of permanence and continuity through time, commit serious crimes for profit, employ violence, corrupt public officials, launder criminal proceeds, and reinvest in the licit economy.

Inspired by the best international practices, during the 1990s more than a hundred country delegations seeking legal transplants drew up the United Nation's Convention against Transnational Organized Crime, also known as the Palermo Convention.[1] For practical reasons, article 1 of the Palermo Convention defines an organized criminal group as "a structured group, committing serious crimes for profit." This very broad definition was settled on rather than one including the most common kinds of organized crime, such as trafficking in drugs, arms, persons, stolen cars, protected species, or terrorism. Still the convention focused on the same kinds of groups as have been singled out by law enforcement agencies using the Falcone checklist, which was later incorporated into the so-called Falcone

framework.[2] This is evident from the three protocols supplementary to the convention, treating trafficking in persons, smuggling of migrants, and trafficking in firearms, as well as from provisions in the convention treating such secondary characteristics of organized criminal activity as corruption, violence, money-laundering, and reinvestment in the licit economy. Thus, well over a hundred countries now have transplanted legislative frameworks compatible with the Palermo Convention.

But as suggested above, the idea that economic growth depends on a rule-of-law state has not been borne out so far in much of Asia. A number of Asian countries were among the signatories of the Palermo Convention, but it is worth asking why they signed in that case and not in others. As a top Chinese official said in December 2000, "The Convention represents a new milestone in international cooperation against transnational organized crime. The nature of this crime dictates that such cooperation be further strengthened" (United Nations Information Service 2000). Indeed, the Chinese, and some other Asian countries, were actively cooperating against al-Qaeda well before America's traumatic 9/11 (Nazarbayev, interview, March 21, 2000). Often, in reforming Asia, commitment to Western-influenced or -dictated legal reform has been less intended to defend the individual rights of people or of businesses as such than to advance government policies, which frequently have benefited most of the people. Many reforming Asian governments became interested in Western-style legal transplants primarily when they saw how useful these transplants would be in their pursuit of critically important foreign trade and investment.

Thus for many the decision to undertake legal reform was in large part prompted by pragmatism and made more progress with the law governing international than domestic affairs. Consider the case of intellectual property legislation in China and other Asian countries, including, as the experience of the third author testifies, Hong Kong while still under British control. The implementation of these laws,

like adherence to World Trade Organization membership requirements, often flows from pressure from abroad or pressure from domestic businesses that realize their production and earnings will rise if adherence to the law is more complete (Ginsburg 2000). In late April 2005 Washington said that it would step up its monitoring of what the acting U.S. trade representative said was "rampant piracy and counterfeiting" in China (*China Reform Monitor* 2005). According to one top analyst of China's legal reform, deep reform will be a long-term process in that country (Lubman 1999).

Methodology and Empirical Analysis

The analysis supporting the policy recommendations later in this essay is found in Buscaglia and van Dijk (2003), an empirical analysis of organized crime activities and public sector corruption in many countries worldwide, which was released by the United Nations Office on Drugs and Crime.[3] In the discussion above, corruption was broadly defined as the abuse of public power for private gain. In order to draw up an organized crime index, the extent of organized crime in a country was assessed using indicators contained in operational investigations conducted by law enforcement agencies (e.g., the Falcone checklist) and in the United Nations Organized Crime Convention and its protocols. It was decided that the official data of criminal activities on police records offered little reliable information on the extent of organized crime in a country. For example, police seizure data on drug trafficking did not show any correlation with other organized crime factors. So the data were omitted and other sources had to be found or developed.

The Buscaglia and van Dijk study (2003) deals with corruption stretching from the streets, including the experiences of ordinary people and of businesspeople in their interactions, to individuals and groups in the highest offices in the country. High-level corruption refers to the extent and frequency with which illegal interest groups

penetrate state institutions and manipulate public policies to favor their interests. To measure high-level corruption, the authors constructed a composite index that takes into account (1) the perceptional indicators on distortions arising from interest groups, (2) the independence of policies from special interest groups' pressure, (3) the likelihood of biased judicial rulings, (4) the perceptions on the percentage of the value of a public procurement—related contract paid for bribes, and (5) the prevalence of state capture.

To assess the prevalence of street-level corruption, the authors used an indicator compiled by the International Crime Victimization Survey (ICVS), whose funding was provided by the Ministry of Justice of the Netherlands, which records how often people experience actual requests for bribes in each country. ICVS data refer to and cover mainly street-level corruption and the medium-level corruption that an average citizen faces while interacting with public agencies. The 2003 study also sought country-specific data on the primary activities of organized crime groups, such as credit card fraud and trafficking in drugs, firearms, stolen cars, cigarettes, and human beings.

Finally, a composite index was constructed including objective indicators of six primary activities, all based on crime statistics compiled by Interpol and the United Nations. These were financial fraud as well as trafficking in human beings, drugs, firearms, stolen cars, and smuggled cigarettes. In addition, the following four secondary aspects were also included in the organized crime composite index: (1) cost imposed by organized crime on business activity, (2) extent of the informal economy as a proportion of gross domestic products, (3) organized crime violence, and (4) money-laundering.[4]

One important source was the World Economic Forum's survey of business (2000), aimed at measuring the cost imposed on firms by organized crime. This survey provided an estimate of the extent of victimization of businesses by such crime. The country ranking, based on the World Economic Forum's index, was correlated with indexes for corruption and violence (homicide). The three indexes were found

to be highly correlated across the large group of countries selected and, as a result, a composite index of nonconventional crime was constructed. Although the composite index has proved robust and has not been much affected by the inclusion or exclusion of individual indicators, continuing efforts are being made to add further statistical indicators.

When designing and drafting organized crime legislation, legislators must pay particularly close attention to identifying the pernicious factors expanding the gap between the law enacted in the books and the law in action. We demonstrate a clear relationship between the frequency of objectively measured organized crime and the quality of judicial rulings. Case-file analyses performed in sixty-seven countries by Buscaglia (2001) show that a proper foundation and motivation are lacking in vast numbers of court rulings in criminal and civil jurisdictions. This explains much of the low predictability, consistency, and coherency (i.e., lack of the rule of law) perceived by the public (Buscaglia and van Dijk 2003). These kinds of assessments in criminal, civil, and labor jurisdictions have uncovered many rulings within the same case-types where a contradictory application of jurisprudential criteria is present in the same court or in courts corresponding to the same jurisdiction. Moreover, substantive flaws are found during audits of court rulings where, for example, case-related facts are systematically not adjusted to the required categorization stipulated by the criminal or civil codes. Other abuses include unjustified procedural delays, contradictory uses of jurisprudence in the same case-types found in the same court, and the use of irrelevant jurisprudence or unrelated (i.e., incorrect) laws to support judicial rulings (Buscaglia and Gonzalez-Ruiz 2002).

The Buscaglia and van Dijk (2003) analysis also demonstrates that judicial independence is strongly related to levels of organized crime. And results show a strong relationship between the perceived independence of the judiciary and the perceived extent of judicial corruption. Statistical analysis confirmed that independent judges

were less vulnerable to corruption and better able to implement laws against organized crime, even when the political system and other areas of the state had been captured by organized crime. In the countries included in the study discussed above, corrupt judges were found to abuse their substantive and procedural discretion through rulings that slowed down or obstructed law enforcement in organized crime cases. Among the factors making it possible for organized crime to capture the court system, the most important were procedural complexity and abuses of substantive judicial discretion. Those links were verified (e.g., that greater procedural complexity was linked to judicial corruption and to higher levels of organized crime). The link between the abuse of substantive judicial discretion on the one hand, and judicial corruption and increases in organized crime on the other, was confirmed through another analysis. Moreover, the lack of predictability in judicial rulings was linked to higher levels of both court corruption and organized criminal activities (Buscaglia and van Dijk 2003, appendix A, tables 13, 1–19).

These and other abuses of judicial discretion constitute the main factor hampering effective legal implementation and cause an increasing gap between law on the books and law in action. There is a clear cause-effect relationship between more consistent and more coherent judicial rulings linked to drug trafficking and lower levels of organized crime. Improved consistency and coherency are ensured by effective control systems applied to rulings by either judicial councils or appellate court systems. Comparatively rated, the countries with the best judicial systems and lowest levels of organized crime are, in decreasing order: Iceland, Norway, Denmark, Singapore, Finland, Austria, Sweden, Luxembourg, Switzerland, New Zealand, Hong Kong, and the United Kingdom. On the other hand, those countries found to lack consistency and coherence in their rulings (i.e., those having frequent abuses of judicial discretion) are also countries where organized crime tends to grow. The worst in these respects, in declining order, are Colombia, Venezuela, Indonesia, the Russian Federation, Argentina,

Mexico, Brazil, the Philippines, South Africa, Thailand, India, and the Slovak Republic. These results (Buscaglia and van Dijk 2003) are founded on United Nations' databases.[5]

In sum, the countries with the best legal implementation strategies in the organized crime domain have developed computerized case management processes for police, prosecutors, and judges, codeveloping multiagency task force systems (for investigations and prosecutions) and computerized court administration. Such reform has made internal corruption and infiltration by organized crime less likely through organizational re-engineering, including elimination of procedural complexity, and through reducing the abuse of procedural and substantive judicial discretion. In that connection, legislatures must contribute to empowering the judicial system to take on new and innovative programs by amending laws to allow the introduction of electronic ways of handling complex evidence linking many case files, and by enacting subsidiary legislation for better case management and for upgrading judges' salaries.

Best International Practices in Counteracting Organized Crime and Public Sector Corruption

There have been some successful or "model" national experiences in the fight against organized crime and public sector corruption. All of these best practices were tailored to local institutions before being carried out nationally. For example, the institutional fight against organized crime, developed during the 1980s and early 1990s in France, Italy, and the United States, included the best practices discussed below (Buscaglia and Gonzalez-Ruiz 2002). Policy analysis based on the Buscaglia and van Dijk (2003) composite indexes explained above confirms a very strong association between high levels of organized crime and high levels of public sector corruption. On the one hand, rampant corruption offers opportunities for organized crime that will be readily exploited by emerging terrorist groups in

their constant quest to supply their operations. On the other hand, when organized crime acquires a dominant position, corruption in the public sector is bound to grow and the state is likely to be captured partly or completely by criminal groups. The ways in which organized crime and public sector corruption "feed" each other justifies treating these complex crimes in the joint manner used throughout our policy recommendations below. Following are some of the best international practices in analyzing and counteracting organized crime and public sector corruption.

The Organized Crime–Corruption Nexus

Five levels of organized criminal infiltration of the public sectors have been identified and need to be addressed by policy makers. (1) The first level consists of sporadic acts of bribery or other abuse of public office in local government agencies by organized crime. This kind of infiltration can be found in most developing countries with weak governance. (2) The second level consists of frequent corruption in low-ranking state officials on the organized crime payroll. This second kind of infiltration is commonly directed at international border checkpoints to ease the traffic of illegal goods and human beings. (3) The third level occurs when organized crime infiltrates the mid-ranks of public sector agencies in an attempt to capture the operational effectiveness of, for example, law enforcement and the judiciary, thus easing the operations of criminal groups. (4) The fourth level of infiltration compromises the heads of public agencies, like the former Mexican drug czar, responsible directly or indirectly for fighting organized crime–related activities (Buscaglia and Gonzalez-Ruiz 2002) or occurs in agencies providing potential long-term benefits to a criminal group, such as Paraguay's custom office. This level represents an increased perniciousness with negative long-term effects on the ability of the state to eradicate corruption and organized crime. (5) Finally, the fifth level of infiltration of organized crime encompasses the cap-

ture of the state's policies by criminal groups who are then able to bias lawmaking, law enforcement, and judicial decisions themselves. This fifth kind of state infiltration, which has been prevalent in the Russian Federation, involves high officials such as senators, ministers, or even presidents of countries. At this fifth level of infiltration, organized crime groups compromise the campaign financing of politicians, act through other more common kinds of extortion or through family connections to high officials, and engage in public procurement. This state capture represents the highest level of public sector corruption and is the basic ingredient in the expansion and consolidation of transnational organized crime.

Experiences in countries' fighting the links between organized crime and public sector corruption show that soft measures alone, such as integrity awareness campaigns, do not have much effect and can even reinforce public cynicism. As shown in Buscaglia and Gonzalez-Ruiz (2002), the organized crime–corruption nexus can only be tackled through a two-pronged approach of civil society, through operational social control mechanisms on the one hand, and more effective law enforcement and prosecution-judicial units on the other.

Criminal Justice Reform: Legislative Issues and Investigative Tools

In order to successfully implement the right legal and criminal justice policy reforms against the combination of organized crime and public sector corruption, states must first have appropriate legal instruments.

In the legal domain, a few countries such as the United States and Germany have pioneered legal practices in which the conspiracy or agreement to commit a crime can be punished, and as a result, these countries have successfully reduced the scale and scope of organized crime. France has declared illicit association, or membership-participation in a criminal enterprise, a form of criminal activity, and this practice has been transplanted from the criminal code of France to the codes of other countries, in particular, of Italy, Spain, and some

states in Latin America. Other countries have outlawed crimes committed collectively by groups. In Italy these are called "associated crimes" or "Mafia-type crimes." In the United States, legislators have enacted the Racketeer Influenced and Corrupt Organizations law (the so-called RICO statute) that prohibits engaging in an enterprise involved in a pattern of criminal activity (racketeering). Judicial rulings have established that a "RICO enterprise" has an organizational structure that carries on its business through primarily criminal activities, with the high probability that these activities will continue in the future. In all these countries it has been shown that the innovative statutes of the country-specific laws can, and have, greatly enhanced the judicial system's ability to dismember or at least inhibit a criminal organization.[6]

Within these legal frameworks, several countries pioneering anti-Mafia policies have also improved their operational ability to gather and analyze complex evidentiary material, over and above the traditional or conventional techniques of investigation. These modern techniques include wire-tapping, controlled deliveries, electronic surveillance, and testimony obtained from witnesses through offers of immunity or other incentives, coupled with the protection of witnesses. Here the United States and Italy have taken the lead.

Moreover, the experiences of Germany, Italy, and the United States in fighting organized crime show that law enforcement requires the most advanced intelligence analysis capabilities in general, and financial intelligence capabilities in particular. These national capabilities should include the ability to engage in case-specific international law enforcement and judicial cooperation to support anticipatory, proactive investigations and prosecutions by clearly determining (1) the structure, composition, and primary activities of criminal networks; (2) the criminal groups' modus operandi (including their production, marketing, and financial logistics); (3) the contacts of organized crime groups with licit business sectors; and (4) the clear delineation of international anticipatory law enforcement strat-

egies. This approach to investigating and prosecuting criminal groups has shown a record of success in Italy and the United States by preventing and hampering the strategies of organized crime to capture states through high-level corruption.

The Need for Specialized Anti-Mafia Units

International experience further shows that establishing specialized units against organized crime in the police and judicial systems (such as in Mexico) or task forces in the criminal justice system engaged in international mutual assistance (such as in the United States) is an effective tool in fighting organized crime.

The establishment of a task force to conduct a complex investigation may be limited to the participation of a single agency or may take a multiagency approach in which representatives from law enforcement and the judiciary are assigned to specific cases. For example, a task force (composed of skilled police investigators, prosecutors, and financial intelligence units) offers the opportunity to use a dedicated unit without depleting the investigative resources of a single organization. The use of team members from other investigative or regulatory agencies often facilitates the gathering of complex evidence. The team concept allows the clear allocation of assignments and responsibilities among members and promotes a sense of unity, all necessary for the team's success.

In this context, questions of leadership need to be addressed. When multiple agencies are represented in a common work unit, a leadership team must be established with two or more investigators from different agencies who share main responsibilities and confidential information on investigative strategies. Legal advisers or prosecutorial representatives should be included in the team to give timely legal assistance and direction on gathering evidentiary material.

As stated above, the building of specialized units in all segments of the criminal justice system is essential for success. The team-based

management of cases, including specialized pools of investigators, prosecutors, and judges, has been introduced with success in Chile, Singapore, and Italy to handle complex criminal cases involving asset forfeiture. In Mexico and some other countries, the formation of elite units of judicial and federal law enforcement agents has been crucial in achieving improvement in the investigations and prosecutions of organized crime cases (Buscaglia and Gonzalez-Ruiz 2002). In addition, these cases have shown that a national coordinating strategy needs to provide for a centralized and consistent database on organized crime groups to be consulted in real time by law enforcement and judicial officers.

Upgrading Judicial Follow-Up

Although higher expenditures for criminal justice by themselves do not ensure better organized crime and corruption control, clearly the criminal justice systems of most developing countries with the political commitment to fight organized crime are critically underfunded. The differences in current and capital spending between developed and developing countries are increasing. For example, developing countries spend an average of $5 to $10 on criminal justice per citizen. However, highly developed economies spend over $165 per citizen on police, prosecutors, and judges. Developed economies have more to spend, and sometimes they even overspend. Yet the analysis conducted in Buscaglia and van Dijk (2003) shows that 87 percent of low- and middle-income countries in the large sample do not allocate enough resources to keep their criminal justice systems running functionally. Besides budget increases, reallocations of current budget resources may be warranted in many of these countries where the police already receive disproportionately generous funding, whereas the prosecutorial and court domains starve from the lack of basic operational resources. Without functioning prosecutorial and judicial systems, law enforcement alone cannot contribute effectively to better

conditions for implementing laws and thus combating complex crimes.

In this framework, the courts must monitor and control the progress of cases from filing to disposition by following a group management approach with a first-instance court judge and a pool of prosecutors jointly managing the case. Experience in Singapore shows that the assignment of cases to different management tracks (i.e., assignment of case files to express, standard, and complex tracks based, among other things, on the quality and quantity of evidentiary material) can also reduce the procedural time and abuse of discretion in judicial rulings. Singapore's judicial experience shows that this system of anticipatory management usually needs to be supported by computerized case-tracking technology, which makes it possible to handle case assignments and respond to law enforcement and judicial officers' concerns on-line in real time. Therefore, reform must ensure the channeling of more cases to these special task forces, increasing the attention given to financial investigations and the building of more valuable evidentiary material supported by intelligence analysis.

In best-practice countries such as Italy, Singapore, and the United States, a system to implement asset forfeitures and their financial management has also been upgraded to expedite the most effective measures against the most important foundations and roots of organized crime. Technical personnel and judicial staff must adopt better information technologies to support case management and the latest investigative techniques such as the use of electronic surveillance, as well as undercover operations and collaborating witnesses. As an incentive to achieve greater operational efficiency, law enforcement agencies can be allowed to retain the proceeds of asset forfeitures, which can be allocated to staff welfare accounts and organizational improvements. In Chile, for example, an agency handles payment of fines and refunds of bail electronically, with payments credited to the law enforcement departments achieving predetermined performance indicators. Experience in Singapore and elsewhere shows that higher

salaries attract more qualified personnel if subject to strict performance-based indicators, thus making corrupt practices less likely (Root 1996; Nadelmann 1993). Yet structural reform of the judicial system is needed first and must include strengthening and modernizing financial management and budgeting, as well as training and developing administrative staff.

Involving Civil Society

The criminal justice systems with the highest effectiveness in fighting organized crime and public sector corruption usually rely on the willingness of citizens to collaborate with state law enforcement efforts. Building this public confidence and trust in the criminal justice system requires first showing civil societies the tangible results of successful policy reform. Moreover, the leaders of the judiciary and law enforcement, the attorney general, chief prosecutor, chief of national police, and members of the Supreme Court, must set good examples by adopting high ethical standards and by establishing strict procedures for ensuring that cases are attended to with due process and are concluded expeditiously. In this, the political will and ability to execute reform are preconditions for building public trust and later for carrying out successful criminal justice policies.

The reform of the criminal justice system in best-practice countries has needed the help and support of other institutions. Political support has fostered an independent criminal justice system and the ability to fight organized crime and public sector corruption, as shown in the legal and judicial reform carried out in Chile and Costa Rica (Buscaglia 1997). Recognizing this early on, countries such as Italy have sought to build bridges between the public sectors and civil society. The relative success in fighting against state captures orchestrated by the Mafia in Palermo (Italy) shows that public information-education campaigns, coupled with the fostering of innovative cultures of institutional change within the state, have been catalysts

in reducing the pernicious effect of organized crime on public sector corruption (Orlando 2001).

In addition, civil society institutions such as the bar association and law schools can play an important part in the reform process. For example, establishing civil society bodies, each composed of a panel of lawyers and other members of the public acting as "court watchers," has proved to enhance the legitimacy of the judiciary in Italy, Costa Rica, and the United States. Successful efforts at forging partnerships for reform set a good example of the balance that can be struck between internal priorities on the one hand and public sector and societal concerns on the other.

Enhancing Judicial Independence

A balance between judicial accountability and the judicial institutions' independence from political forces is a necessary condition for achieving success in enforcing laws to fight organized crime and public sector corruption (Orlando 2001), just as an efficient judiciary is essential for fast and lasting economic development (Begovic 2004). Yet this balance between democratic accountability and institutional independence requires a prior basic consensus among the main political forces within countries. Constitutional provisions requiring the separation of powers are not enough to guarantee the judicial independence needed for the unbiased and transparent interpretation and enforcement of the law. Formal constitutional provisions are not even a necessary condition for attaining judicial independence. Countries such as Israel, New Zealand, Sweden, and the United Kingdom—all countries with high levels of judicial independence coupled with low organized crime and low levels of corruption—do not possess constitutionally entrenched judicial independence.

The examination of international experience shows that the political elements contributing to an independent criminal justice system's ability to fight organized crime and public sector corruption can

be identified. For example, the cases of Costa Rica, and to some degree, Chile, show that when the political concentration of power in the legislative and executive branches is relatively balanced, so that alternation in power is the likely outcome of periodical elections, judicial systems are all the more able to interpret laws with independence and autonomy. To some degree, a balance of power among truly competing political forces creates an increased willingness among politicians to give up a good part of their political control of court and prosecutorial decisions in order to avoid a "mutually assured destruction" in subsequent electoral periods when the opposition may take over the reins of power. This sequential game between or among political forces operates as a tacit insurance policy that guarantees greater independence of the criminal justice system from political whims (Buscaglia 1997).

Accordingly, a framework guiding policy makers during legal and judicial reform must first identify the main areas where undue pressure is most likely to hamper the state's ability to adjudicate cases of organized crime and public sector corruption. The identification of these areas must focus on the links between judicial systems and other governmental and nongovernmental institutions, without neglecting to review factors hampering independence in the judiciaries themselves. Once the political preconditions for the policy reforms mentioned above are present, initiatives must then address technical best practices. Lessons from case studies in Costa Rica, Chile, Italy, and Singapore show the following best practices enhancing the judicial independence of courts and prosecutors (Buscaglia 1997; Root 1996):

1. The development of improved, uniform, and widespread case-management systems, coupled with transparent, coherent, and consistent rules for case assignments.
2. The adoption of uniform and predictable administrative (i.e., personnel and budget-related) measures founded on rewards and pen-

alties driven by performance-based indicators, thus clarifying the career horizon of judicial and law enforcement officers.

3. The reform of the criminal justice system's organizational structure. This includes introducing a more divided set of organizational roles for judicial, prosecutorial, and police personnel to secure their own internal independence.
4. The enhancement of the judiciary's ability to review the consistency and coherency of decisions instilled in court rulings by improving the effectiveness of judicial (appellate-based) reviews and by allowing the monitoring of civil society–based social control mechanisms, working hand in hand with the media (e.g., court-watching NGO types).
5. The governance-related improvements in links between the political arena and judiciary in accord with the preconditions described above.

Policies in the Socioeconomic and Financial Domains

Those countries pursuing best-practice policies in the fight against organized crime and public sector corruption have also adopted economic and financial policies that go beyond the legal and judicial measures stated above. It is clear now that in tackling corruption and organized crime, multidimensional measures are needed.

In the economic-financial domain in the fight against organized criminal groups, best practices include

1. Reducing poverty and raising salaries for public employees to hamper the uncontrolled growth of corruption that tends to increase political instability, which in turn stimulates the penetration of the state by national criminal organizations or, worse, by transnational ones
2. Reducing the incidence and dimension of informal markets that

provide the economic inputs and outputs related to organized crime

3. Improving the distribution of income and wealth
4. Reducing barriers to the international exchange of goods and services
5. Adopting and more coherently applying financial regulations through specialized supervisory state agencies for handling financial investigations

In the financial regulatory domain, the experience of Mexico shows that the state's ability to trace, identify, monitor, seize, and confiscate financial assets and other criminal proceeds is critical to the strategy of any organized crime containment program. This requires a major global infrastructure of legislation not only for restraining criminal proceeds but also for confiscation purposes.

As drug-related issues gain prominence in the international political culture, there have been several efforts to reform the anti-laundering and criminal proceeds legislation in many countries, as well as to expand the police and prosecutorial roles in financial investigations (including customs and excise), increasingly involving tax fraud and terrorist activities. For instance, in 2000 the Financial Action Task Force (FATF) launched its "Non Co-operating Countries and Territories Initiative." This initiative, a move toward an all-crime and transnational organized crime focus, was intended to counteract the slow adoption of FATF standards in some territories and is accompanied by guidelines for regulated banks in imposing more severe sanctions for noncompliance. Even more complicated at this point would be an international effort to legalize certain drugs, an effort that many advocate (and many others strongly oppose) in order to better control drug use and the crime that now surrounds drug use (Carpenter 2003; Jordan 1999).

Main Conclusions

The ability of a country to develop economically and of international terrorist groups to operate effectively within a country depends in large part on the terrorists' logistical and strategic links to organized criminal networks and on the degree of support they enjoy from public sector corruption. The levels of organized crime and of public sector corruption in countries are determined first by the quality of the central state institutions, such as the police, prosecutors, and courts. This relationship seems to hold for countries in all stages of development. In this context, the institutional forces preconditioning improvements in the legal fight against corruption and organized crime are accounted for in this essay. These conditions are the ones fostering an institutional environment within which criminal justice can be administered in an unbiased and transparent fashion. Independently of these institutional determinants, the levels of organized crime and corruption are linked to human development while underdevelopment and rampant organized crime go hand in hand. This link points to the vicious circle of poverty exploited by terrorist organizations and in extreme cases to deficient state agencies that are brought under the control of organized crime.

Taken as a group, these facts confirm that organized crime, corruption, and underdevelopment prosper in an environment of bad governance. Insufficiencies in economic and financial regulation and poor legal-judicial infrastructures are among the many negative aspects of governance relevant for crime control. This appears to be the case for developing countries generally and for countries in postconflict situations in particular. Countries that have given priority to crime and corruption control in the early stages of development are now among the most economically successful in their regions, among them Singapore in Southeast Asia and Botswana in sub-Saharan Africa. In Europe, the capital city of Sicily, Palermo, offers a telling example of how better control of the local Mafia has come

along with strong economic revival. The list of countries and regions with dysfunctional state systems, rampant organized crime and corruption, and stagnant economies is depressingly long by comparison (World Bank 2002). These dysfunctional states simply emphasize the fact that by strengthening their ability to prevent and control organized crime, states can both fight the economic foundations of terrorism and eliminate a major impediment to human, economic, and even political development.

Too few developing countries and development experts seem to have fully appreciated the far-reaching effect of a functioning justice system (Ratliff and Buscaglia 1997). Unlike conventional crime, which seems largely controlled by structural root causes outside the sphere of short- or medium-term influence of the state (van Dijk 1999), organized crime and corruption seem more susceptible to state interventions. This finding has important implications for both crime control and development policies. If development prospects are dependent on the effective control of organized crime and corruption through law enforcement and the rule of law, the latter emerge as the main hidden success or failure conditions of human development, at least in many parts of the world, or perhaps everywhere in the longer term. This conclusion opens the prospect of enhanced development through constructive, focused interventions of relatively limited proportions in developing countries. Investment in the legal infrastructure of developing countries, aimed at abilities to deal with organized crime, will be small in comparison with the investment needed to bring physical infrastructures up to international standards, but the latter will be far more possible, in most areas, in a country ruled by law. The return on investment, in increased human development, will be vastly higher in the medium period than what resulted from traditional development cooperation in the past.

One could say that the world's legal landscape has been transformed within a decade as an increasing number of countries, for example, have enforced or adopted laws permitting or requiring the

disclosure of assets and mutual legal assistance, though these countries' actual conformity with the FATF's standards varies. Few reputable financial centers offer bank secrecy as an option. Nevertheless, the visible enforcement of financial regulations aimed at the proceeds of organized crime has been modest. Moreover, the operational inability of police, prosecutors, and judges to handle cases involving financial investigations is still an institutional constraint in most countries. In short, experience in Chile, Italy, Mexico, and the United States shows that strengthened financial regulatory frameworks come hand in hand with lower levels of organized crime, at the same time that these frameworks are not easily adopted or implemented.

NOTES

1. For the text of the convention, see www.unodc.org/palermo/convmain.html.
2. The Falcone checklist gives an operational account of organized criminal groups working in a certain jurisdiction by describing the composition, structure, modus operandi, licit-illicit linkages, and other aspects needed for the investigation and prosecution of criminal networks. For more details, see Buscaglia and Gonzalez-Ruiz (2002).
3. This jurimetric study covers a large sample of countries, representing worldwide interregional diversity stratified by level of socioeconomic development. It deals with the following states and territories: Albania, Argentina, Australia, Austria, Azerbaijan, Belarus, Belgium, Bolivia, Botswana, Brazil, Bulgaria, Canada, China, Colombia, Costa Rica, Croatia, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hong Kong Special Administrative Region of China, Hungary, India, Indonesia, Ireland, Italy, Jamaica, Japan, Kyrgyzstan, Latvia, Lithuania, Malaysia, Malta, Mongolia, Netherlands, Paraguay, Peru, Philippines, Poland, Portugal, Republic of Korea, Romania, Russian Federation, Singapore, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Thailand, Uganda, Ukraine, United Kingdom of Great Britain and Northern Ireland, United States of America, Venezuela, Vietnam, Yugo-